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No. 90-543

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH R. GIANNINI, PETITIONER

v.

HONORABLE MANUEL L. REAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS (EXCEPT JUDGE A. WALLACE TASHIMA) IN OPPOSITION

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QUESTION PRESENTED

Whether the Local Rules of the United States District Courts for the Central, Southern, and Eastern Districts of California, which require attorneys seeking admission to those courts to be members in good standing of the California State Bar, are constitutional as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 911 F.2d 354. The opinion of the district court (Pet. App. 17-35) is reported at 711 F. Supp. 992.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1990. The petition for a writ of certiorari was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an attorney and a California resident. He is also a member of the New Jersey and Pennsylvania bars. After twice failing the California bar examination, petitioner filed a federal court action in 1987 challenging the constitutionality of that examination. The district court dismissed that action for lack of subject matter jurisdiction. *Giannini* v. *Committee of Bar Examiners*, No. C-87-3797-JGD (C.D. Cal.). The court of appeals affirmed, concluding that since petitioner had failed to appeal to the California Supreme Court, which has the authority to grant or deny admission to the bar, he had suffered no deprivation under federal law. *Giannini* v. *Committee of Bar Examiners*, 847 F.2d 1434, 1435 (9th Cir. 1988) (per curiam).

In March 1988, petitioner filed a separate federal court action challenging the constitutionality of Local Rule 2.2.1 of the United States District Court for the Central District of California, which provides that

> [a]dmission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

C.D. Cal. Local R. 2.2.1; see *Giannini* v. *Real*, No. C-99-1467-RB (C.D. Cal.). The district court stayed the action pending petitioner's exhaustion of administrative remedies before the State Bar of California. Pet. App. 37-41.

In July 1988, petitioner filed a "Petition for Admission and Other Declaratory Relief" with the California Supreme Court. Pet. App. 3. On October 12, 1988, the California Supreme Court summarily denied the petition. *Id.* at 36.

2. On October 24, 1988, petitioner filed a second federal court action against the federal and state respond-

ents, namely, the United States District Courts for the Central, Southern, and Eastern Districts of California and the judges of those courts (federal respondents), and the California Supreme Court and its justices and the Committee of Bar Examiners and its members (state respondents). Petitioner challenged the constitutionality of the applicable federal court local rules, which limit bar membership to active members of the California state bar, see C.D. Cal. Local R. 2.2.1; accord S.D. Cal. Local R. 110-3(a)(1); E.D. Cal. Local R. 180(a), as well as the constitutionality of the state bar examination. Pet. App. 18-21.[1] With respect to the federal respondents, petitioner alleged that the local district court rules violate the Due Process Clause, the Full Faith and Credit Clause, the constitutional "right to travel," principles of "right and justice," and the Rules of Practice and Procedure of this Court. *Id.* at 28-29.[2]

The district court dismissed each of petitioner's claims against the federal respondents. Pet. App. 32-35.[3] Relying on *In re Roberts*, 682 F.2d 105, 109 (3d Cir. 1982), the court first rejected the claim that the local court rules violate the Rules of this Court. Pet. App. 30-31. The court next determined that "[t]he right to practice law is not a fundamental one," and then concluded that the considera-

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[1] The district court—with the parties' agreement—treated petitioner's previously filed action as dismissed. Pet. App. 21 n.3.

[2] As petitioner is a private attorney, this case does not involve the effect of the statutory authority of the Attorney General to direct attorneys under the supervision of the Department of Justice to appear before federal courts. See 28 U.S.C. 509, 515-519, 533.

[3] The district court also dismissed petitioner's claims against the state respondents, Pet. App. 21-28, and the court of appeals affirmed, *id.* at 4-11. To the extent petitioner renews those claims before this Court, see Pet. 25-30, they merit no further review.

tions underlying the local rules "amply satisfy the requirements of a rational basis for the classification." *Id.* at 33, 34 (citing, among other factors, that federal district courts in California rely on California's bar examination for determination of fitness to practice, that questions of California law arise often in cases within the jurisdiction of the federal district courts in California, and that the California bar is available for policing attorney misconduct). The court thus rejected petitioner's claims based on the Due Process Clause.

Turning to petitioner's claim under the Full Faith and Credit Clause, the court concluded that his

> suggestion that because he is licensed in Pennsylvania and New Jersey, the district courts in California must not only recognize that he is licensed there, but also license him here, is entirely without merit. Neither Pennsylvania nor New Jersey determined that [petitioner] is entitled to practice law in California.

Pet. App. 34. The court rejected petitioner's claim based on the right to travel, holding that "[d]enial of the right to practice law in the United States District Courts involved in this case is not a violation of any right to travel within the ambit of any federal constitutional provision." *Id.* at 35.

3. The court of appeals affirmed. Pet. App. 1-16. With respect to petitioner's challenge under the Due Process Clause, the court of appeals agreed with the district court, holding that the "considerations set out by [the federal respondents] amply satisfy the requirement of a rational basis for the classification" in the local court rules. *Id.* at 13.[4] The court also rejected petitioner's challenge

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[4] The court of appeals referred to the following considerations:

(1) the * * * district courts, having no relevant procedures of their own, rely on the California bar examination for determination of

under the Full Faith and Credit Clause, "because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that [petitioner] is entitled to practice law in California." *Ibid.*[3]

ARGUMENT

1. Petitioner asserts (Pet. 25-27) that since he has a "fundamental right" under the Due Process Clause to practice law, the court of appeals erroneously upheld the constitutionality of the challenged local rules under the less stringent "rational basis" standard of review. Petitioner is mistaken. As this Court has made plain, "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis* v. *Flynt*, 439 U.S. 438, 443 (1979). And federal courts have rejected the proposition that there

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fitness to practice law; (2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the California bar provides the district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation; (4) allegations of professional misconduct can be brought to the attention of the State Bar; (5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; and (6) attorneys who are members of the California and the district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests.

Pet. App. 12-13.

[3] In the court of appeals, petitioner also claimed that the local court rules violate the constitutional "right to travel" and Rule 5.1 of the Rules of this Court, and are otherwise inconsistent with the "right and justice" standard inherent in the supervisory power of the federal courts, see *Frazier* v. *Heebe*, 482 U.S. 641 (1987). The court of appeals rejected each of these claims, see Pet. App. 13 n.7, 14-16, and petitioner has not sought further review of them.

is a fundamental right—under the Due Process Clause—to practice law. *E.g., Lupert* v. *California State Bar,* 761 F.2d 1325, 1327-1328 (9th Cir.). cert. denied, 474 U.S. 916 (1985).[6] For the reasons articulated by the courts below, see Pet. App. 12-13, 33-34, the challenged local rules plainly bear a rational relationship to an attorney's fitness to practice law before the federal respondents. See *In re Roberts,* 682 F.2d 105, 108 (3d Cir. 1982).[7]

2. Petitioner also contends (Pet. 28-29) that the challenged local rules violate the Full Faith and Credit Clause. That claim is makeweight. As the court of appeals correctly pointed out, California's retesting of an attorney licensed in New Jersey and Pennsylvania does not run afoul of that constitutional provision "because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that [petitioner] is entitled to practice law in California." Pet. App. 13.

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[6] Petitioner's reliance (Pet. 25-27) on *Supreme Court* v. *Piper,* 470 U.S. 274 (1985), is off the mark. That decision involved a challenge to state bar policies under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, not the Due Process Clause. Moreover, *Piper* involved a state bar rule that discriminated against out-of-state residents. Petitioner is a resident of California.

[7] Petitioner also challenges the local rules on the ground that the Constitution prohibits the federal respondents from allowing pro hac vice admission only to attorneys who are licensed and reside in States other than California. See Pet. i, 29-30. Since petitioner did not raise that issue below, and does no more than suggest it in his petition (without elaboration and without invoking any specific clause of the Constitution), review by this Court is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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